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No. 85-859

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1985

BETTY LYNN SULLIVAN,

Petitioner,

V.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ of Certiorari To The Court of Appeals for the First Supreme Judicial District Of Texas

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RESPONDENT'S BRIEF IN OPPOSITION

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney General for Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

PAULA C. OFFENHAUSER*
Assistant Attorney General

LIZ BILLS
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

**Attorney of Record*

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QUESTION PRESENTED

WHETHER THE TRIAL COURT'S RESTRICTIONS ON VOIR DIRE DENIED PETITIONER THE RIGHT TO EFFECTIVELY EXERCISE HER PEREMPTORY CHALLENGES IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Appeals for the First Supreme Judicial District of Texas, *Sullivan v. State*, 678 S.W.2d 162 (Tex. Ct. App.-Houston [1st Dist.] 1984), is reproduced as Appendix A to the Petition for Writ of Certiorari. The Texas Court of Criminal Appeals refused the petition for discretionary review on May 8, 1985, *see* Appendix C to the Petition for

Writ of Certiorari, and denied Petitioner's motion for rehearing on July 10, 1985. *See* Appendix D to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under a nonexistent subsection of 28 U.S.C. § 1253. This Court has jurisdiction over Petitioner's claim only under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases her claim upon the sixth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

A. *Course of Proceedings and Disposition Below*

Respondent has lawful custody of Petitioner pursuant to a judgment and sentence of the 185th District Court of Harris County, Texas, in Cause No. 338,543, styled *The State of Texas v. Betty Lynn Sullivan.* Petitioner was charged with the offense of felony criminal mischief to which she entered a plea of not guilty. Petitioner was tried by a jury which found her guilty of the offense charged and assessed punishment at two years confinement in the Texas Department of Corrections.

Petitioner's conviction was affirmed by the Court of Appeals for the First Supreme Judicial District of Texas on August 30, 1984. *Sullivan v. State*, 678 S.W.2d 162 (Tex. Ct. App.-Houston [1st Dist.] 1984). The Texas Court of Criminal Appeals refused the petition for discretionary review on May 8, 1985. The same court denied Petitioner's motion for rehearing on July 10, 1985.

B. *Statement of Facts*

The facts relevant to Petitioner's claim are comprehensively set forth in the opinion of the court below. *Sullivan v. State*, 678 S.W.2d 162 (Tex. Ct. App.-Houston [1st Dist.] 1984) (Appendix A to the Petition for Writ of Certiorari).

SUMMARY OF THE ARGUMENT

There is no special or important reason to review this case. The issue presented involves only the application of well settled constitutional principles to the facts involved herein.

The court below determined that the trial court judge's limitations on voir dire by the defense did not deprive Petitioner of any constitutionally protected right. The Court of Appeals found that the trial court's restrictions were reasonable as Petitioner's attorney was afforded a reasonable opportunity to test the partiality of the prospective jurors. The trial court and appellate court below properly applied the correct constitutional standard, although not couched in federal constitutional terms, to Petitioner's particular factual situation. This Court does not sit to review evidentiary determinations based upon settled principles of law. Thus, this Court should decline to exercise its certiorari jurisdiction in this case.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case, and none exist.

II.

REVIEW SHOULD BE DENIED SINCE THE QUESTION RAISED CONCERNING THE TRIAL COURT'S LIMITATIONS ON JURY VOIR DIRE INVOLVES ONLY MATTERS OF ESTABLISHED FEDERAL CONSTITUTIONAL STANDARDS.

The Petition for Writ of Certiorari does not raise unsettled questions of law. The issue addressed involves nothing more

than evidentiary questions and factual determinations made by the state trial and appellate courts and their application of well settled principles of constitutional law in deciding adversely to Petitioner.

In *Irvin v. Dowd*, 366 U.S. 721 (1961), this Court held that the constitutional standard of fairness requires "a panel of impartial, indifferent jurors." *Id.* at 722.

> It is not required, however, that the jurors be totally ignorant of facts and issues involved . . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Id. at 722-23. The Court noted, however, that despite a juror's assurances to the contrary, if a final, preconceived opinion has been formed he or she would be incompetent. *Id.* The burden is on the Petitioner to show "the actual existence of such an opinion in the mind of the juror . . . ." *Id. quoting Reynolds v. United States*, 98 U.S. 145, 156 (1879). There is no constitutional presumption of bias or prejudice and while a member of an unpopular minority group must be awarded the solicitude which properly accompanies a criminal defendant, she is not entitled to unusual protection or exception. *See Rosales-Lopez v. United States*, 451 U.S. 182, 190 (1981); *Dennis v. United States*, 339 U.S. 162, 168 (1950).

Voir dire is conducted under the supervision of the trial judge who has broad discretion as to the questions to be asked. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973); *Ristaino v. Ross*, 424 U.S. 589, 594 (1976). The determination of impartiality of prospective jurors, in which demeanor plays an especially important part, is particularly within the province of the trial judge. *Ristaino v. Ross*, 424 U.S. at 595. The trial court has a serious duty to ascertain whether a prospective juror is actually biased against the accused, and a broad discretion in its rulings or challenges therefor. *Dennis v. United States*, 339 U.S.

at 168. Further, "[t]he finding of the trial court upon that issue ought not be set aside by a reviewing court, unless the error is manifest." *Id.* These principles were recently affirmed in *Patton v. Yount*, _____U.S._____, 104 S.Ct. 2885 (1984); *see also Wainwright v. Witt*, _____U.S._____, 105 S.Ct. 844 (1985).

The standard for voir dire applied by the court below, although not couched in federal constitutional terms, parallels the federal standard. The court below carefully reviewed the record of the voir dire examination and found that Petitioner had failed to demonstrate reversible error as Petitioner was afforded a reasonable opportunity to test the partiality of prospective jurors. *Sullivan v. State*, 678 S.W.2d at 167. The trial judge advised both sides before voir dire began that each side had forty-five minutes for voir dire. *Id.* at 165. Petitioner's attorney made no objection to this time limitation. *Id.* The court below found that Petitioner's attorney spent an inordinate amount of time on general principles of law and the presumption of innocence. *Id.* at 166. Her attorney attempted twice to inform the jury panel of the contents of the message spray-painted on the Exxon building in order to determine whether any juror would be influenced by its political implications. *Id.* at 165. He also attempted to question the veniremen as to whether testimony by a police officer concerning prior dealings with Petitioner in connection with her activities as a communist supporter would affect anyone's ability to remain impartial. *Id.* The State's objections to both lines of questioning were sustained. *Id.* Although the defense was given three additional minutes of voir dire, at the end of voir dire, Petitioner's attorney dictated a bill of exceptions consisting of thirty questions he would have asked the jury panel. *Id.*

The court below held that these restrictions on voir dire by the trial court were within its sound discretion as the questions not permitted were essentially restatements of the question whether Petitioner's support of the Revolutionary Communist Party would influence the deliberations. *Id.* at 166. The court below found that some of the proposed questions would have been proper and that other questions, such as inquiries into jurors' political affiliations and political prejudices, would have been improper. *Id.* at 167. Finally, the court below found that Petitioner's attorney's general inquiry as to prejudice

against Petitioner's political activities which had received no juror response was sufficient to test the partiality of prospective jurors. *Id.*

Petitioner asks this Court to do nothing more than test the evidentiary sufficiency in her particular case applying well settled federal constitutional standards. This Court sits to decide important, novel or recurring questions. Petitioner's claim does not justify the exercise of this Court's certiorari jurisdiction. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

For these reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
Executive Assistant Attorney
General of Litigation

F. SCOTT McCOWN
Assistant Attorney General
Chief, Enforcement Division

PAULA C. OFFENHAUSER*
Assistant Attorney General

LIZ BILLS
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

Attorneys for Respondent
**Attorney of Record*